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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 245

C. O. HANSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, C. O. HANSON, by his undersigned attorneys, respectfully prays for a writ of certiorari to The United States Court of Appeals for the Sixth Circuit in the above cause.

JUDGMENT AND OPINION BELOW

The judgment and sentence of the United States District Court for the Northern District of Ohio, East-

ern Division, is not reported but appears at pages 114-a and 115-a of the Record certified by the Clerk of the Court of Appeals below, and filed with this Court.

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming said judgment was filed on April 26, 1958, and corrected on May 29, 1958. The Opinion, as corrected, is reported in 254 F.2d 359, and in the Appendix hereto. The original opinion and the order of correction appear in the certified Record.

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on April 26, 1958, and appears in the addition to the Record, following page 740-a, certified by the Clerk of the Court below.

JURISDICTION

The Petition for Rehearing was denied on June 2, 1958, by the United States Court of Appeals for the Sixth Circuit and the said denial appears in Volume II of the Record, immediately preceding the certification of the Clerk of the Court below.

The time for the filing of this petition, in the absence of an extension, expires on July 2, 1958; however, Mr. Justice Harold H. Burton, on June 26th, 1958, extended the time for the filing of this Petition to and including August 1, 1958.

Jurisdiction is conferred upon the Supreme Court of the United States to review this cause by writ of certiorari by Section 1254-(1), (Title 28, USC) as enacted June 25, 1948; and the petition is timely within the purview of Rule 22-2 of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. Was the Court below correct in holding that the doctrine of inspection of a document—in this case, the diary maintained by the Government witness—by defense counsel instead of by the Court "in camera" as pronounced by this Court in *Jencks* v. *United States*, 353 U.S. 657, decided subsequent to the trial in the case at bar, is inapplicable here because "Appellant's only objection was based on the failure to disclose the name of the party involved in the other tax matter."; or,

Is, as this Court stated in *Jencks* v. *United States*, at page 1015:

> "The burden is the Government's, not to be shifted to the trial judge, to decide * * * upon the possible disclosure of state secrets and other confidential information in the Government's possession."?

2. Where the Government on rebuttal adduced testimony and exhibits relating to the purported sale by dependent's corporation to the Ritter Lumber Company, on September 6, 1945, for $6,275.00, and the trial Court, over the objection of the defense, admitted such testimony and exhibits into evidence for a limited purpose by stating to the Jury:

> "The Court: Ladies and gentlemen of the jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here, and show for whatever bearing you may find it may have on the absence of any mistake."

and, where such shovel, purportedly sold, is not charged in the corporate or individual indictment, nor in the

Bills of Particulars, nor in the testimony adduced by your petitioner in his case-in-chief; and no proof was offered that the defendant received the proceeds of the purported sale; was the Court below correct in holding:

> "While it would *not* be otherwise admissable, it was properly introduced as evidence rebutting appellant's testimony."? (Italics supplied)

3. Did the trial Court err in admitting the evidence, set forth in Question No. 2 during the course of the trial pre-judge the defendant and in its statement to the jury at the time of such admission prejudice the defendant by assuming such evidence to be conclusive of the conclusion that the defendant received the proceeds of said sale when, in fact, no evidence whatsoever was tendered respecting the payment of said sum. The statement by the trial Court being:

> "Ladies and gentlemen of the jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here; and show for whatever bearing you may find it may have on the absence of any mistake."

just as did the Court below which mistakenly holds such evidence:

> "While it would *not* be otherwise admissible, it was properly introduced as evidence rebutting appellant's testimony."? (Italics supplied)

4. The Government on rebuttal adduced testimony and exhibits of another sale by defendant's corporation to the Ritter Lumber Company on January 4, 1946, the same in all respects as the factual situation

posed in Question No. 2, excepting that there was no corporate indictment or corporate bill of particulars for the year 1946; and the trial Court stated to the Jury:

> "This evidence, ladies and gentlement, is received with the limited purpose as it may throw light on the motive or intent of the defendant. It is not charged in the indictment as being an offense committed by him."

and the Court below held:

> "While it would *not* be otherwise admissible, it was properly introduced as evidence rebutting appellant's testimony." (Italics supplied)

Was this correct?

5. Here we raise the same question regarding Question No. 4, as that presented in Question No. 3 regarding Question No. 2, with the changed situation respecting the Indictment and the Bill of Particulars, and a slightly changed statement by the Court to the Jury; but the same holding by the Court below.

6. Did the Court below err in holding the defendant's point had no merit where the trial Court failed to decide Defendant's suggestion and motion made after verdict and before sentence, under circumstances where the motive by Defendant to reconvene the Jury for interrogation by and in the presence of Counsel for both parties to ascertain whether in fact the jurors, in arriving at their verdict, considered only the evidence that there were missing serial numbers of shovels, whereas the trial Court, in admitting such evidence, restricted it to the purpose of motive and intent; such information of the Jury's deliberations being sup-

plied to Defendant's Counsel by J. Donald Strawn; Juror number 2, who agreed to make a statement on that subject; however, when the time arose for a meeting for that purpose, he advised Counsel that he had decided not to make a statement; that he had talked to Judge McNamee, a long-time acquaintance, who had advised him not to make the statement; that he had talked to the trial Judge, who told him to use his own judgment as to what he should do; and he now had concluded not to make a statement?

7. Where the charge of fraud in an individual's income tax return rests upon the premise that monies he received from sales by a corporation of which he was President constituted income to him—the said sales not being recorded on the corporate books as sales, but included in the corporate inventory at sales price, so that the corporate income, in such cases, was not understated; and the individual omitted such monies from his tax return on the premise that he owed the corporation the money—can such charge of fraud be sustained on the theory of a constructive dividend; or

a. Is not a constructive dividend such only after a legal pronouncement that it is such; and, therefore, cannot be the basis for a charge of fraud; and

b. Is it not a fact that a constructive dividend requires as a basic condition the depleting of the corporate pocketbook to that extent; and

c. Is it not a fact that the substitution of one asset for another (Inventory in lieu of cash or accounts receivable) does not result in the depletion of the corporate net worth; and

Was it not error for the Court below to hold that, based on such constructive dividends:

> "There was substantial evidence to sustain the jury's verdict both as to appellant's intent, and as to his filing of false and fraudulent returns."?

8. Did the Court below err in holding that the trial Court correctly denied the Defendant's motion to dismiss the indictment involving the corporate return for the year 1945 on the grounds that it is vague and indefinite in that it charges in the singular the filing of *a false and fraudulent tax return*, whereas at least two returns, an income tax return and an excess profits tax return were due and filed, and the Bill of Particulars and the proof adduced were directed to more than one tax return?

9. Where the trial Court admitted in evidence a series of tabulations by the Government agents, Cannon and Susko, for the limited purpose of illustration only and not as evidence of the facts set forth therein; and then permitted blown-up copies of said exhibits to be placed upon easels in full view of the Jury; was it error to leave such blown-up copies not admitted into evidence at all, in full view of the Jury during the testimony of other witnesses and arguments by counsel over the objections of counsel; and did the Court below err in failing to find error in such procedure?

10. The Court below held that:

> "Whether appellant received the proceeds of the sales in the capacity of a trustee, intending to repay the corporation when it was safe to do so, and whether appellant understated the income of the corporation for 1945, and his own individual income for 1945 and 1946, were questions of fact."

nevertheless, notwithstanding the above statement in its opinion the Court below found no error in the trial Court's refusal to admit in evidence proof of the defendant's settlement with the corporation in 1954; that is, Defendant's Exhibit SS for Identification. Was it not error to fail to reverse the trial Court?

11. Did the Court below err in failing to hold that the trial Court erred in failing to grant the Defendant's Motion for Judgment of Acquittal made at the close of the Government's case-in-chief, repeated after the close of all the evidence, and again after verdict in Motion in Arrest of Judgment, on the grounds that not a scintilla of evidence was adduced establishing that the corporate and individual returns specified in the indictment were, in fact, false and fraudulent; or, that the Defendant did willfully and knowingly attempt to defeat and evade part of the taxes due and owing by the corporation or the Defendant?

12. Is not the Government bound by the Exhibits it offers in evidence, and where such exhibits show a course of conduct by the Defendant, inconsistent with guilt and consistent with innocence and mistake, should not the trial Court have taken the case from the Jury and granted the Defendant's motions of acquittal?

STATUTE

INTERNAL REVENUE CODE—1939

SECTION 145(b). FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully at-

tempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(d) PERSON DEFINED.—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member, is under a duty to perform the act in respect of which the violation occurs.

STATEMENT OF THE CASE

On March 10, 1952; the federal grand jury sitting at Toledo, Ohio, returned two indictments against the Defendant charging the Defendant in one indictment with knowingly and willfully filing false and fraudulent income tax returns with intent to evade personal income taxes for the years 1945 and 1946 (Deft. App. 12a-14a); and, in the other indictment, charging him with knowingly and willfully filing *a false and fraudulent tax return* for the corporation—The Hanson Clutch and Machinery Company, of which the defendant was President—for the year 1945. (Deft. App. 11a-12a). It will be noted that no fraud was charged nor was there an indictment for the corporate return for the year 1946. The sufficiency of the corporate return indictment for the year 1945 is raised in Question No. 8.

The Defendant was tried on the indictment covering the individual returns for the years 1945 and 1946 (Deft. App. 12a-14a), in 1952, by a Jury before Judge

Kloeb in the Western Division sitting at Toledo, Ohio, and was found guilty. At that time, he was not tried on the charge involving the corporate return for the year 1945.

On appeal, the United States Court of Appeals for the Sixth Circuit, (208 F.2d 914) on December 21, 1953, reversed the judgment and remanded the case for a new trial. The Court reversed on the grounds inter-alia that the trial Court had erred in excluding evidence of the corporate treatment of a number of "M" invoices, as it:

> "deprived the appellant of the one explanation he had why the money claimed by the government to be his unreported income was not his money, but belonged to the company, and that he was, in a sense, only a trustee, or holder of the funds for the benefit of the company." (208 F.2d 914, 916).

Notwithstanding the foregoing statement in the reversal, the trial Court in the second trial refused to admit in evidence Deft. Exh. SS for Identification (Deft. App. pp. 128a-138a) the contract of settlement between the Defendant and his corporation, and the Defendant made a proffer of proof (Def's App. pp. 138-141a). This issue is raised in Question No. 10.

After remand, the individual and corporate cases were transferred to the Eastern Division of Ohio and Judge Weick granted the Defendant's motion to consolidate both cases for trial (Deft. App. p. 33a) but denied the motion to dismiss both indictments (Deft. App. pp. 31a, 33a). The motion to dismiss both indictments rested on three grounds (Deft. App. 31a); two of which, 2(b) and 2(c), have since been resolved by this Court and are no longer at issue. (*Achilli v. United States*, 353 U.S. 373; however, ground 2(a)

rested upon the theory that a constructive dividend (Deft. App. pp. 36a-40a) was a concept that required a judicial determination and, *a fortiori*, could not be the basis of a criminal charge. This issue is raised in Question No. 7. The attack on the indictment covering the corporate return was grounded on the fact that the indictment (Deft. App. pp. 31a, 32a) referred to *the tax return in the singular* without characterization, whereas, in fact, an income tax return and an excess profits tax return were filed; and the failure to state which return was false was fatal to the indictment. This issue is raised in Question No. 8.

The issue of fact relates to the treatment of a group of invoices designated "M" invoices, and whether in fact they were treated as they were for the purpose of concealing violation of the Controlled Materials Plan provided for by federal statute to conserve materials for Government use during the war period and to escape the penalties provided thereunder; and or whether the plan was conceived and carried through as a part of a plan to willfully and knowingly file false and fraudulent tax returns with the intent to evade taxes.

The plan had its origin by the issuance of the first "M" invoice on February 21, 1945.

The complete testimony has been included in the Defendant's Appendix and the reading of it fails to disclose a scintilla of evidence establishing fraud by the Defendant-Petitioner. As later herein appears, the Defendant directed that all "M" invoices be included in Inventory at sales price so that the corporation would pay its full income tax, and, substantially the entire sum was included in Inventory at sales price.

so much so, that the indictment respecting the corporate return for 1945 rests upon a few omissions from Inventory claimed to be a mistake; and for the year 1946, there was no indictment respecting the corporate return because every "M" invoice sale was inventoried at selling price. This issue of failure of proof is raised in Question No. 11. The Defendant freely admitted that he received all the proceeds of the "M" invoice sales, adduced during the Government's case-in-chief, such proceeds being turned over to him by the corporation's bookkeeper (Deft. App. p. 611a); in fact, very early in the trial, the defense was prepared to stipulate that all the proceeds of the aforesaid "M" invoices did reach the Defendant (Deft. App. pp. 257a; 258a). However, the Government chose to detail the methods of the monies reaching the Defendant (Deft. App. p. 258a) and presented its proof. Such proof included a great mass of invoices, including Gov. Exh. 12-f (Deft. App. 121a) which bears the legend in the Defendant's handwriting "List in Inventory", all of which we contend is binding upon the Government as producing proof of the Defendant's innocence. This issue is raised in Question No. 12.

The uncontradicted record shows that early in 1945 (Deft. App. p. 611a), the Defendant yielded to the supplications of his sales manager (Deft. App. p. 612a) and authorized the sale of goods without priority to meet a competitive situation (Deft. App. p. 611a) but that he showed

> "by all means keep it separate and out of the sales records for at least the time being until such time as we can get them back into sales where they belong." (Deft. App. p. 611a)

The first "M" invoice was No. 51, dated 2 21 45, in the amount of $60.00 (Deft. App. p. 612a, Gov. Exh. 14), and an analysis of Gov. Exh. 14 shows the issuance of:

Six "M" invoices between 2 21 45 and 3 8 45 aggregating $440.22, or an average of $18.37 per invoice; then one "M" invoice dated 3 9 45 in the amount of $1,566.82 for repair parts for a Model 33 Hanson machine (Deft. App. pp. 612a, 613a); followed by twenty-eight "M" invoices issued between the dates of 3 13 45 and 6 6 45 aggregating $1,034.55; or an average of $36.95 per invoice. (Gov. Exh. 14)

To this point the foregoing facts show the issuance of thirty-five "M" invoices between the dates of February 21, 1945, and June 6, 1945, aggregating $2,711.59; or an average of $77.47 per invoice, whereas total sales of the corporation for the year amounted to $1,926,324.80. (Gov. Exh. 90).

On June 6, 1945, there was sold to the Erie Basin Metal Products Company 2 Hanson cranes on invoice "M 90" for $14,620.00. The Defendant testified they were his property (Deft. App. p. 608a) and had been his property since 1940 (Deft. App. p. 609a) and the *Government* introduced as *Gov. Exh. No. 71* a photostat of the minutes of the 267th Regular Director's Meeting of the corporation of September 10th, 1940, whereat 2 pilot model 31 shovels were presented to the Defendant as his personal property (Deft. App. p. 123a), and we raise the question of the Government being bound by the testimony it adduces in Question No. 12.

Thereafter, between the dates of June 11, 1945, and July 9, 1945, "M" invoices, six in number, aggregat-

ing $135.06 were issued (Gov. Exh. 14). These average $22.51 per invoice.

Then, in point of time, "M" invoice 93 was issued to L. R. Kranz in the amount of $6,692.00 on July 10th, 1945, (Gov. Exh. 14, 15). This was an experimental crane (Deft. Exh. A, Deft. App. pp. 164a, 165a) sold on the instalment basis (Gov. Exh. 15).

Following the aforesaid Kranz sale, there was issued during the period July 11, 1945, and October 19, 1945, thirty-two "M" invoices aggregating $835.69 (Gov. Exh. 14), or, an average of $26.12 per invoice.

From October 19, 1945, ten weeks before the close of the year, larger amounts are involved. The record to October 19, 1945, compiled from Gov. Exh. 14, and the items appearing on Gov. Exh. 95, disclose:

The issuance of seventy-three (73) invoices aggregating $3,682.34, an average of $50.44 per invoice; plus the sale to Erie Basin of two shovels for $14,620.00 which the Defendant claims were his property, and that is confirmed by the Government in Gov. Exh. No. 71; and the instalment sale to Kranz of an experimental machine for $6,692.00.

The record shows that the bookkeeper kept the invoices not as yet recorded as sales in a manila envelope in the corporation safe (Deft. App. pp. 644a, 645a).

Between October 20, 1955, and December 29, 1955, there were eight large sales aggregating $43,465.00 (Gov. Exh. 95) that were included in the inventory at sales price at the end of 1945; and one sale of $1,529.65 on "M" invoice 142 that bears the Defendant's handwriting (Gov. Exh. 12-F, Deft. App. p. 121a) "List in inventory". The Defendant testified that the subject

matter of this invoice was in inventory (Deft. App. pp. 647a, 648a). The Defendant testified (Deft. App. pp. 615a, 616a) that as the year end approached he became concerned about the accumulation of "M" invoices and he instructed Mr. Reinman, the bookkeeper, to be sure Mr. Ditslear got those invoices and put them in inventory at sales price; and that the invoice M 142 (Gov. Exh. 12-F) was on top of the group and he thought he then wrote on the top invoice "List in inventory" (Gov. Exh. 12F). Mr. Ditslear died about 1950 (Deft. App. p. 616a). The Defendant also testified that he spoke directly to Mr. Ditslear and directed him to get the invoices from Mr. Reinman and put them in inventory at sales prices (Deft. App. p. 616a). This evidence is **uncontradicted.**

Therefore, for the year 1945, on the corporate accounting, $44,994.65 of "M" invoice sales were admittedly included in inventory at sales price, therefore, were fully tax paid, and $46,153.65 "M" invoice sales were not included in inventory. The $46,153.65 not included in inventory includes the Erie Basin sale of $14,620.00 which the Defendant claims was his own property (Deft. App. pp. 608a, 609a) and the Government's own evidence (Gov. Exh. 71) appears to bear out the Defendant. The Defendant explained the delay of five years in making this sale as occasioned by the fact that these machines could not be used on Government orders, because such orders were conditioned on inspection during the various stages of manufacture (Deft. App. p. 610a) and the Navy required light weight machines without cabs and without crowding mechanism (Deft. App. pp. 609a, 610a).

Of the remaining four uninventoried machines, three were sold on the instalment plan (Gov. Exh. 95-15,

11D, 86) that is, Kranz M-93, Herbert London M-139, Mat London M-140, and one was in transit to Texas over the year-end (Gov. Exh. 95, 1-L).

To summarize the facts for the year 1945 (Gov. Exh. 95),

9 machines were included in Inventory at sales price aggregating (Gov. Exh. 95, Deft. App. pp. 647a, 648a, 16a)	$44,994.65
2 machines were the property of the Defendant and not the corporation, aggregating	14,620.00
3 Machines were sold on the instalment plan and we suggest were filed separately aggregating	20,643.84
1 Machine was in transit on the Inventory date and therefore easily overlooked, amounting to	5,980.30
103 small invoices, averaging $47.66 per invoice and aggregating	4,909.51
Many of which were the Defendant's personal property (Deft. App. pp. 671a, 681a, 682a)	
Making a total at issue for the year 1945 insofar as the corporate records are concerned of	$91,148.30

In the final analysis, the question is: do the three instalment sales and the one in transit constitute fraud knowingly and willfully perpetrated by the Defendant, or are such items explained as the errors of the employees. The Government offered not one scintilla of evidence that these four items constituted fraud knowingly and willfully perpetrated.

The analysis contained in the preceding fifteen (15) paragraphs all are grounded on Government Exhibits and we raise in Questions No. 11 and 12, the failure of

proof by the Government and the binding effect on the Government of the evidence adduced by it.

There were no indictment respecting the 1946 corporate return, although "M" invoices were issued in that year (Gov. Exh. 96). All the sales of machines in 1946 not included in sales were inventoried at sales price, therefore, fully tax paid (Gov. Exh. 96, 1-O, 5-C, 5-P, 5-R). The 1946 Machines are four in number; the serial numbers of which are: #1930 (Gov. Exh. 1-O) shipped to Consolidated Power Co., on January 3, 1946, and billed in the amount of $5,228.80 appearing in the inventory (Gov. Exh. 94-a, line 9, Deft. App. 454a), at $5,228.80; #2031 (Gov. Exh. 5-C) shipped to the Harry Cornelius Company on November 6, 1946, and billed in the amount of $7,563.68 and appearing in the Inventory (Gov. Exh. 94-a, Deft. App. p. 457a) at $7,556.12; #2034 (Gov. Exh. 5-P) shipped to Barrasso's Cement Block Mfg. Plant on November 7, 1946, and billed in the amount of $6,806.00 and appearing in the Inventory (Gov. Exh. 94-a, line 4, Deft. App. p. 457a) at $6,806.00; #2040 (Gov. Exh. 5-R) shipped to Contractors' Equipment Company and billed in the amount of $6,448.85 and appearing in the Inventory (Gov. Exh. 94-a, lines 1 and 2, Deft. App. p. 460a) at $6,448.85; Boom (Gov. Exh. 3-a) shipped to L. R. Kranz and paid for on September 23, 1946, in the amount of $800.00 (Gov. Exh. 96) and appearing in the Inventory (Gov. Exh. 94a, Deft. App. p. 156a) at $800.00.

The only other items affecting the corporation for the year 1946 are seventy-nine small "M" invoices issued in 1946 (Gov. Exh. 14) aggregating $900.60, and averaging $11.40 per invoice. The Defendant testified (Deft. App. 671a, 682a) that such of these items as

were not his personal property were in inventory although he could not pick them out.

In support of the indictment relating to the individual tax returns of the Defendant for the years 1945 and 1946, the Government offered no proof of fraud. The Government added to the reported income of the individual all the receipts relating to the alleged corporate omissions from sales, without regard to the fact that the corporate net worth was not depleted. The compilation contained in Government Exhibits 95 and 96 is composed of the following factors:

	1945 Gov. Exh. 95	1946 Gov. Exh. 96	Total
Net addition to reported income	73,657.91	45,020.07	118,667.98
Items Inventoried at Selling Price by Corp.: M125, 128, 129, 131, 135, 142, 151, 153, 158, 185, 212, 213, 221	44,994.65	(26,831.71)	71,826.36
Balance	28,663.26	18,188.36	46,851.62
Defendant's Personal Property not income in these years — Erie Basin sale	14,620.00		14,620.00
Balance	14,043.26	18,188.36	32,231.62
Collections on 1944 Sale —L. R. Kranz	2,500.00		2,500.00
Balance	11,543.26	18,188.36	29,731.62

	1945 Gov. Exh. 95	1946 Gov. Exh. 96	Total
1945 Sale in Transit		5,980.30	5,980.30
Balance	11,543.26	12,208.06	23,751.32
Collections on 1945 Instalment Sales:			
L. R. Kranz (M 93)	2,942.28	3,749.72	6,692.00
H. London (M 139)	1,817.92	3,600.00	5,417.92
M. London (M 140)	1,182.92	1,980.00	3,162.92
Total Instalment Collections	5,943.12	9,329.72	15,272.84
Balance	5,600.14	2,878.34	8,478.48
Trivia and items that include considerable personal property of the Defendant:			
Small "M" invoices	4,909.51	900.60	5,810.11
Scrap Sales	345.75	1,343.21	1,688.96
Interest	44.88	334.53	379.41
Director's Fees	300.00	300.00	600.00
Total trivia and personal Property	5,600.14	2,878.34	8,478.48
Balance	none	none	none

The preceding paragraphs and the compilation contained therein are directed to the facts regarding Questions No. 11 and 12.

The Defendant, in 1949, sought to repay the corporation the proceeds of the sales that had been in his care for the company (Deft. App. p. 618a); but counsel, a Mr. Raymond, of Detroit, advised him not to do so while the income tax investigation was in progress (Deft. App. p. 618a). Later, in 1954, the Defendant, on advice of other counsel, did make a settlement with the corporation (Deft. App. p. 619a). The Defense offered the settlement agreement in evidence as De-

fendant's Exhibit 88 for Identification (Deft. App. pp. 128a-138a) and the Court reserved at that time its ruling (Deft. App. p. 649a). Subsequently, the Court refused to admit the settlement (Deft. App. p. 696a) into evidence and the Defense made a proffer of proof (Deft. App. p. 138a-141a). This goes to the issue raised in Question No. 10.

The Government's case on the 1945 corporate and individual returns and the 1946 individual return is summarized in Gov. Exh. 95 (Deft. App. 352a, 353a), 95a (Deft. App. 362a, 363a), 95b (Deft. App. 366a), 95c (Deft. App. 368a), 96 (Deft. App. 378a), 96a (Deft. App. 383a), 96b (Deft. App. 384a), 96c (Deft. App. 387a) through the witness Kenneth M. Cannon, a special agent in the Intelligence Division in the Internal Revenue Service (Deft. App. 330a). In each case, the exhibit was offered for the "limited purpose only of illustration" and not as evidence of the items set forth therein (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 384a, 387a), the witness Cannon testifying with respect thereto.

From the testimony and the foregoing exhibits accepted for the limited purposes stated, the Government witness, Revenue Agent Gregory Susko (Deft. App. 468a) testified to the amount of tax the Defendant allegedly understated in the 1945 corporate return and the 1945 and 1946 individual returns; and this was accepted in evidence for the same limited purpose, that is, as illustration and not as evidence of the facts set forth therein, Gov. Exh. 95d (Deft. App. 472a), 95e (Deft. App. 475a), and 96d (Deft. App. 477a, 478a).

The proof adduced in the testimony of special Agent Cannon summarized in the illustrative exhibits presented through him, and the proof adduced in the testimony of Revenue Agent Susko summarized in the illustrative exhibits presented through him makes self-evident the failure of the Government to present a case warranting submission to the Jury.

For example: let us take the year 1946. Revenue Agent Susko testified that the amount available for dividends by the corporation *according to the return* was $47,469.35 (Deft. App. 477a). Of course, the return does not take into account the amounts the Government claims the income to be understated. One item not taken into account in that figure is $37,848.56 additional tax for 1945 (Gov. Exh. 95d). This sum which became—on the Government theory—a liability on March 15, 1946, as expounded by the Court below in *Drysbrough* v. *Com. of Int. Rev.* (238 F.2d 735, 6 C.C.A.) decided December 3, 1956, when deducted from the amount testified to as available, that is, $47,469.35 (Deft. App. 477a), reduces the amount theoretically available, at this point, to $9,620.79. However, the $47,469.35 starting point (Deft. App. 477a) now reduced to $9,620.79, is to be further reduced by $30,938.31 applied by this witness (Gov. Exh. 95d) as a constructive dividend for 1945 (Deft. App. 479a). The inescapable fact is that for the year 1946, since all machine sales not reflected in sales appeared in inventory at sales price, there was no depletion of the corporate pocketbook, and with no depletion there can be no constructive dividend. These facts relate to Question No. 7.

For the year 1945, we have this example: The witness Revenue Agent Susko, in determining the fraud

on the Defendant's 1945 individual tax return (Gov. Exh. 95a) can find only $30,938.31 to characterize as a constructive dividend (Deft. App. 476a), which amount is developed from (Gov. Exh. 95d). He then adds $42,419.60 (Gov. Exh. 95e, Deft. App. 476a) as to which he can find no constructive dividend, but adds it as "diverted receipts of The Hanson Clutch & Machinery Company (Deft. App. 476a). This item of $42,419.60 plus the alleged constructive dividend of $30,938.31 plus the directors fees of $300.00 (all appearing on Gov. Exh. 95e, and testified to as reported on page 476a) appear in detail and aggregate the $73,657.91 shown on Gov. Exh. 95. It includes $47,341.80 (Gov. Exh. 95) included in closing inventory at sales price and other minor adjustments. The sum of $42,419.60 is treated by the witness Susko (Gov. Exh. 95e) as income to the Defendant in his individual capacity as a taxpayer despite the fact that Gov. Exh. 95 and the testimony by Special Intelligence Agent Cannon shows the sum of $47,341.80 (which includes the $42,419.60) not to result in depletion of the corporate pocket-book. If there is no depletion of the corporate pocket-book, how can there be a diversion. The facts show a substitution of one asset (inventory at sale price) for another (proceeds of sale)—not "diverted receipts" (Deft. App. 476a). Again the requirements of the Court below, as pronounced in *Drysbrough v. Com.*, 238 F. 2d 735, have not been met. These facts relate to Question No. 7.

Government Exhibits 95, 95a, 95b, 95c, 95d, 95e, 96, 96a, 96b, 96c, 96d (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 387a), were received in evidence over objection by the Defense while Special Intelligence Agent Cannon and Revenue Agent Susko were on the

witness stand, *limited for the purpose of illustration only, and not as evidence of the facts set forth therein* (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 384a, 387a). Over objections by the Defense (Deft. App. 353a, 354a, 363a) enlargements of the foregoing exhibits ranging in size from five feet square (Deft. App. 354a, 378a) to two and one-half feet square (Deft. Exh. 363a, 366a, 368a, 383a, 384a, 387a, 472a, 475a, 478a) were placed upon easels in full view of the Jury and permitted to remain in such view during the testimony of other witnesses and the argument by Counsel to the Jury, despite objections by Counsel for the Defense (Deft. App. 469a, 491a, 634a, 734a, TR. 1143). These facts relate to Question No. 9.

Special Intelligence Agent Kenneth M. Cannon, called as a Government witness, testified that he first talked with the Defendant on October 25, 1948, in the Defendant's office, in the presence of Revenue Agent Susko (Deft. App. 332a).

The balance of the testimony respecting the agent's conversation with the Defendant appears on pages 332a and 333a, and the cross-examination on pages 396a-397a of Deft. Appendix. This interrogation and the following paragraph relate to the issue raised in Question No. 1, and clearly partake of impeachment purposes.

Following the luncheon recess, with the Jury excluded, the Government asked the Court not to permit the Defense to inspect the documents the witness agreed to produce (Deft. App. 400a, 407a). The position of the Defense is succinctly set forth on pages 402a-403a, and 406a-407a, concluding with the objection by the Defense. The purpose of the evidence, impeaching the witness, is stated by the Defense on page 413a of Deft.

App. and the interrogation continues through page 415a (Deft. App.). Since the foregoing record was made, this Court, on June 3, 1957, decided *Jencks* v. *U.S.*, (353 U.S. 657 77 S. Ct. 1007); holding inter-alia that in view of the fact that only the defense is adequately equipped to determine effective use of Government's documents for purpose of discrediting Government's witness and thereby furthering the accused's defense, the defense rather than the Court, must initially be entitled to see and determine what use may be made of them (Headnote No. 5, 77 S. Ct. 1007).

The Defendant left Tiffin, Ohio, for Miami, Florida, on January 27, 1946, and returned to Tiffin, Ohio, on March 9, 1946, (Deft. App. 617a). The Corporation *Tax Returns* for the year 1945 were signed by the Defendant on Monday, March 11, 1946. (Gov. Exh. 90, 90a, Deft. App. 617a, 618a, 592a, 464a, 465a). The 1945 Corporation Income Tax Return (Gov. Exh. 90) was prepared by Ernest C. Weiss and signed by him on February 26, 1946, (Deft. App. 464a) and the same is true respecting the corporation Excess Profits Tax Return (Gov. Exh. 90a), Mr. Weiss has an accounting firm in Toledo Ohio, (Deft. App. 464-a). This state of facts goes to Question No. 11.

The Government rested its case-in-chief on the afternoon of Monday, February 25, 1957, (Deft. App. 491a) shortly after Court reconvened at 2 p.m. that day (Deft. App. 490a). On resting, the Government did so without any reservation whatsoever (Deft. App. 491a). It did not seek a continuance or recess until another witness could be brought to Court. It rested its case-in-chief without any reservation or qualification whatsoever (Deft. App. 491a).

Notwithstanding its unqualified resting, the docket entries show the return on February 27, 1957, (Deft. App. 3a) of a subpoena served on Walker A. Pollard, a Government witness, on his arrival in Cleveland from Roanoke, Virginia, (Deft. App. 712a); the said Pollard took the stand shortly after the beginning of the afternoon session (Deft. App. 672a, 712a) as part of the Government's case on rebuttal. Over objection by the Defense that it was not proper rebuttal (Deft. App. 712a, 713a, 714a) the witness was permitted to testify to the purchase of two shovels, not included in the indictment, (Deft. App. 714a, 716a), not included in the Bill of Particulars (Deft. App. 14a-30a); and not the subject of Defense testimony. The one alleged sale (Gov. Exh. 117, 117a, 117b, 117c) appears to have been made by the corporation on September 6, 1945; (Deft. App. 715a); the other (Gov. Exh. 118) alleged sale appears to have been made by the corporation on January 4, 1946. For the year 1946, there was no corporate indictment; *and there was no evidence of the Defendant receiving the proceeds of sale of either machine.*

Nevertheless, the exhibits (Gov. Exh. 117, 117a, 117b, 117c, 118) and the testimony of Government witness Walker A. Pollard (Deft. App. 712a-721a) was admitted in evidence by the trial Court under the following rulings (Deft. App. 714a, 716a-717a):

> "The Court: Ladies and Gentlemen of the Jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here, and show for whatever bearing you may find it may have on the absence of any mistake."
>
> * * * *

"The Court: This evidence, ladies and gentlemen, is received with the limited purpose as it may throw light on the motive or intent of the defendant. It is not charged in the indictment as being an offense committed by him."

That the foregoing testimony and exhibits, admitted for the limited purposes of intent, as rebuttal, were extremely prejudicial to the Defendant is clearly apparent from the deliberations of the Jury.

The facts set forth in the preceding four paragraphs relate to the issues raised in Questions No. 2, 3, 4 and 5, and their importance to Question No. 6.

Following the discharge of the Jury, Counsel for the Defense interviewed the Jury in order to ascertain the basis for their verdict; and the shortness of their deliberations—less than two hours excluding lunch—in a case consuming nine trial days. Several jurors informed counsel that the only fact they considered was missing serial numbers of shovels. Excepting for one answer (Tr. 375) that made reference to missing serial numbers, the record is bare on this subject until the Ritter Lumber testimony on rebuttal; nor was that subject included in the queries submitted by a Juror or Jurors to the Court earlier in the trial. (Deft. App. 545a).

J. Donald Strawn, Juror number 2, agreed to make a statement on that subject; however, when the time arose for a meeting for that purpose, he advised Counsel that he had decided not to make a statement; that he had talked to Judge McNamee (a brother Judge to the trial Judge), a long-time acquaintance, who had advised him not to make the statement; that he had talked to the trial Judge who told him to use his own

judgment as to what he should do; and now has concluded not to make a statement.

The premise for the verdict of the Jury here is most important, in view of the limitation placed on the Ritter transaction by the Court.

The defense in its Motions after verdict and Memorandum of Law on Motion for a New Trial moved that the Court (Deft. Appx. 108a, 109a)

> "summon the Jury for interrogation by and in the presence of Counsel for both parties so that the miscarriage of justice may be corrected."

This motion the trial Court denied (Deft. App. 110a). The preceding four paragraphs go directly to Question No. 6.

REASONS FOR ALLOWING THE WRIT

At the outset, we believe it well to present to the Court why, in our opinion, this case should have so many questions that Counsel feel should be presented to this Court. Counsel has appeared on numerous occasions before this Court in the past two decades, and, never before, has it been necessary to present more than two or three questions. Here, however, the whole conduct of the trial was such that Counsel, in good conscience cannot ignore the many facets resulting from one error leading to another.

The trial Judge, his Honor Paul C. Weisk, is an estimable, patient and fair man; nevertheless, when this trial began he had been a Judge only ten months (Judge Weisk took office April 16, 1956, and this trial started February 18, 1957); and, we understand the case at bar was his first criminal trial of any duration or importance. With such limited judicial experience,

the numerous errors are perhaps understandable. Mr. Bailey, Chief Government Counsel (Mr. Ugast, we understand, was present purely to guide Mr. Bailey and participated in the conduct of the trial comparatively little) likewise received his baptism as Government Counsel in an important tax case in the case at bar.

We cannot in any other way explain the failure to realize the effect of submitting testimony without considering the binding effect on the one who adduces it.

Under the circumstances, the writ should be granted in order to correct a manifest injustice based upon the sanction by the Court of Appeals of a departure from the accepted and usual course of judicial proceedings by the trial Court, as to call for an exercise of this Court's power of supervision.

Another ground for the granting of this application for a Writ is the failure of the Court below to properly construe this Court's opinion in *Jencks* v. *United States*, 353 U.S. 657. The Court below appears to have entirely overlooked this Court's mandate that (p. 672):

> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

Of course, the *Jencks* case was decided after the trial in the case at bar and neither Counsel nor the trial Judge had the benefit of that decision; in fact, the parties argued and relied upon and distinguished the case of *Goldman* v. *United States*, 316 U.S. 129, which this Court distinguished in the *Jencks* case.

As a basis for its holding, quoted above, this Court stated that (pp. 668-669):

> "We hold, further that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.
>
> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

A third ground for the granting of this application for a Writ is a question of Federal Tax that should be but has not been decided by this Court. That question involves the situation where a *constructive dividend* is advanced as a basis for a fraud charge; and, its pertinence here is the indictment and conviction on the filing of the 1945 and 1946 *individual* income tax return.

There are two cases in the Court of Appeals that are considered as relating to this point—that is, the case of *Currier* v. *United States*, 466 F. 2d 346, decided by the First Circuit and *Poucet Davis* v. *United States*, 226 F. 2d 331, decided by the Sixth Circuit. Both of

these cases are distinguishable from the case at bar. In the *Currier* and *Davis* cases large sums of money were diverted from corporations controlled by the defendants; and the corporations had that much less assets than they would have had had there been no purloining of the corporation's assets. Here, there was no depletion of the corporate asests. Inventory at sales price was substituted for cash or accounts receivable and the corporation has as much assets after the event as before the event.

The Court below, in its reversal of the first trial, realized that the evidence of the "M" invoices was important and necessary, stating (*Hanson v. United States*, 208 F. 2d 914-916):

> "We are of the opinion that this [inventorying at sales price] was reversible error as it deprived appellant of the one explanation he had why the money claimed by the government to be his unreported income was not his money, but belonged to the company, and that he was, in a sense, only a trustee or holder of the funds for the benefit of the company."

Nevertheless, it failed to find error in the trial Court's refusal to admit in evidence Defendant's Exhibit 88 for Identification (Deft. App. p. 128a-138a) and the Defendant did make a proffer of proof (Deft. App. p. 138a-141a).

Addressing ourselves specifically to the series of errors during the trial, we find they fall into two groups: one growing out of the rebuttal testimony regarding the two Ritter sales and the other stemming from the tremendous volume of exhibits placed into evidence by the Government. For the latter purpose, the entire testimony is included in Defendant's Appendix.

As to the rebuttal evidence (purported Ritter sales), the Court below finds "it would not be otherwise admissible" but that it did properly rebut the Defendant's testimony. It will be noted that the proceeds of these purported sales were not shown to have been placed in the hands of the defendant—the Government was unable to prove payment at all. Therefore, while they were admitted for the limited purpose of proving intent and motive, how can they prove such a fact when there is no proof of payment. If we are to suppose—why not suppose that other machines were traded for these two items. Apparently, the Court below was misled by the trial Court's statement to the jury (Deft. App. p. 714a) which concludes:

> "and show for whatever bearing you may find it may have *on the absence of any mistake*. (Italics supplied)

Query: How can such evidence have any bearing on "mistake" when payment is not established?

This error (Question No. 2, 3, 4, 5 and 6) led to the Jury's failing to heed the Court's restriction on the use of the Exhibits and the Jury's search for missing machine numbers complained of in Question No. 6.

Obviously, the Court below was correct in holding that such evidence was otherwise *not* admissible; and, of course, without proof of disposition of the proceeds it was not proof of anything at all—certainly not intent or motive.

The exhibits of sales, invoices, bank checks and deposits of proceeds introduced by the Government as Government Exhibits run close to two hundred (200) in number. Of the nineteen machines involved, thirteen were, by the Government's own Exhibits included in Inventory at sales price and two were by the Gov-

ernment's own Exhibit (Erie Basin sale, Gov. Exh. 71) the personal property of the Defendant, with no proof of any profit to him in 1945 or 1946.

Does not such proof by the Government establish the innocence of the Defendant? It leaves only four (4) machines in question and it is not hard to reason that their omission was a mistake instead of fraud—three (3) of them were sold on the instalment plan and one (1) was in transit on the Inventory date.

Here, then, we have only proof of conduct the contrary to fraud with the instructions of the Defendant (Gov. Exh. 12-g) (Deft. App. 121a) "List in Inventory" and not a scintilla of proof pointing to fraud.

That is why we urge that here is a case that requires the exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of said Court of Appeals had in this cause, to the end that the proceedings and decision therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that the petitioner be granted such other and further relief as may seem proper.

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APPENDIX

FILED
April 26 1958
CARL W. REUSS, Clerk

Nos. 13317-13318-13319

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. O. HANSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided April 26, 1958.

Before McALLISTER, MILLER and STEWART, Circuit Judges.

PER CURIAM. This is the second time the above case has come before this Court. In *Hanson* v. *United States*, 208 F. (2d) 914, appellant Hanson was convicted of knowingly and willfully attempting to defeat and evade the payment of personal income taxes. In that case it appeared that appellant was the owner of 1,118 shares of a total of 1,247, in the Hanson Clutch and Machinery Company; that his sister and brothers-in-law owned 125 shares; and that the balance of 4 shares were owned by two other men. The books of the company disclosed the use of three types of invoices. Evidence was produced by the government, of the issuance of a fourth type of invoice for which the corporation had no records. These invoices known as "M" in-

voices represented sales of power shovels, cranes and other equipment by the Hanson Company. These sales were not shown as sales on the books of the company; but "M" invoices had been included in inventory at sales prices. The explanation of this strange form of entry was as follows: Hanson was selling products to customers in violation of the Controlled Materials Plan, provided by federal statute. The company issued the so-called "M" invoices in such sales. If these sales showed on the company's books, it would be obvious to an inspector that the company was guilty of violation of the Controlled Materials law. In order to avoid violation of the income tax laws, it was decided not to enter these sales as sales, but to record them as items in inventory, not at cost, but at sales price. By placing them in inventory at sales price rather than at cost price, the profits on the sales would be reflected upon the books of the company so that at the end of the year, when the income tax return was made up for the company the tax on such profits would be paid even though the transactions had not been entered as sales. The checks which were received on these sales were cashed by Hanson, and he claimed to hold the money for the company.

In the first trial, the District Court refused to permit evidence to be introduced to the effect that the items on the "M" invoices had been posted on the books of the company in inventory at sales prices. On the former appeal, this Court held that the exclusion of such evidence was error, as it deprived Hanson of the one explanation he had why the money claimed by the government to be his unreported income was not his money but belonged to the company, and that he was in a sense, a trustee for the company.

On the retrial before a jury on charges involving both the corporate taxes and his individual taxes, appellant was found guilty of willfully attempting to defeat and evade

the payment of corporate taxes for 1945, and his own individual income taxes for 1945 and 1946. During the retrial, all of the invoices which had been excluded on the first trial to show items in inventory at sales prices, were admitted in evidence. The government credited appellant with all of the invoices that had been included in the inventory. The charge of evasion of the payment of the corporate taxes related to those invoices which had not been included in inventory, and represented income which had been diverted from the corporation. The proofs showed that substantial sales were made by the corporation which were not shown in its sales or cash receipts records, or in the inventory account. Checks in payment of these sales, payable to the corporation and bearing its restrictive endorsement for deposit in its bank account only, were not deposited in the corporation's bank account, but were diverted by appellant who received the proceeds of the checks. There were no records of these sales in the corporate books; and appellant kept no record of the funds which he diverted.

Appellant contended that he had violated the priorities regulations of the War Production Board by sales to purchasers who had no priority order, and that he concealed such violations by not entering the transactions on the company's sales records and cash receipts book; and that he took the receipts himself, intending to repay the corporation later. This, like other claims of appellant raised an issue of fact. Whether appellant received the proceeds of the sales in the capacity of a trustee, intending to repay the corporation when it was safe to do so; and whether appellant understated the income of the corporation for 1945, and his own individual income for 1945 and 1946, were questions of fact. The jury found that appellant had willfully and knowingly attempted to defeat and evade taxes due from the corporation for the calendar year 1945, as well as taxes due from him for the calendar years 1945 and 1946, by filing false and fraudulent tax returns for those

calendar years. There was substantial evidence to sustain the jury's verdict both as to appellant's intent, and as to his filing of false and fraudulent returns.

On the trial, during the cross-examination of Special Agent Cannon, he stated that he had made a diary entry concerning a particular conversation about which he had testified on direct examination. Cannon stated that on the same page of the diary there was a reference to other matters concerning other people. Appellant's counsel then stated that Cannon could "cover up the balance of the page . . . if he has several notes on the page and he has one specifically applying to this case, it seems to me the rest can be covered up, and we can see that note referring to this case:" Counsel said further that he did not want the diary turned over to him, but simply to have the witness refer to his diary regarding the notes of this particular case. The Special Agent then stated that the page of the diary contained an entry concerning the tax liability of another person. The trial court then inspected the diary and allowed the defense to use the extracts that pertained to the instant case, stating that the remainder had relation to another matter that could not be brought out. Appellant's only objection was based on the failure to disclose the name of the party involved in the other matter. Such an entry had no relevancy to the testimony of the witness in the instant case; and the refusal of the trial court to allow counsel to see the name of the party involved in the other tax matter, not connected with appellant's case, was not error, and does not fall within the rule announced in *Jencks* v. *United States*, 353 U.S. 657, which was decided subsequent to the judgment of the District Court in this case.

We find no error in the use of the summaries and enlargement of schedules showing the government's computations of appellant's income and liability which were used during the examination of witnesses for purposes of illustration

as well as during the summation. The trial court carefully instructed the jury that they were not actual evidence and were submitted only for the jury's assistance in considering the other evidence, which they purported to summarize. The admission of certain evidence introduced by the government on rebuttal is claimed to have resulted in reversible error. While it would not be otherwise admissible, it was properly introduced as evidence rebutting appellant's testimony. It is contended by appellant that the trial court erred in refusing to dismiss the indictment on the ground that it was too vague and indefinite to charge a crime. The indictment was sufficient to enable appellant to prepare his defense and protect him against a second prosecution for the same offense; and this fulfills the requisites of certainty in an indictment. The other contentions of appellant have been considered and are found to be without merit.

In accordance with the foregoing, the judgment of the District Court is affirmed.

FILED
Dec. 21, 1953
CARL W. REUSS, Clerk

No. 11731

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

208 F. 2d 914

C. O. HANSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Decided December 21, 1953.

Before MARTIN, McALLISTER, and MILLER, Circuit Judges.

PER CURIAM. Appellant was convicted by a jury of knowingly and wilfully attempting to defeat and evade the payment of personal income taxes. On appeal, we are primarily concerned with two claimed errors on the trial—the refusal of the trial court to permit certain evidence to be introduced in defense of the charge against the accused, and refusal to instruct the jury as requested.

Appellant was the owner of 1118 shares of a total of 1247 shares of the common stock of the Hanson Clutch and Machinery Company. His sister and two brothers-in-law owned 125 shares, and the balance of 4 shares was owned by two other men. Appellant was also the

owner of all of the preferred stock of the corporation. An agent of the Bureau of Internal Revenue, Gregory Susko, in checking the books of the corporation, was informed by appellant that in its sales, the corporation issued three types of invoices: "E" invoices for excavators; "C" invoices for clutches; "R" invoices for repairs; and he was further advised that these were the only designations used for invoices on sales by the company. Thereafter, Agent Susko, with a commendable, and remarkable, awareness of his duties, noticed that a certain contractor, Kranz, was using a new Hanson shovel. He thereupon checked the books of the Hanson Company and found that there was no record of the sale of this shovel to Kranz. He interviewed Mr. Kranz and obtained from him the original invoices of the Hanson Clutch and Machinery Company which covered the sale of the shovel to him. At that time, he noticed that the invoice number on the Kranz transaction was M-93. He then called upon the sales manager and chief bookkeeper of the Hanson Company, as well as Mr. Hanson, and inquired whether there were any invoices of the Hanson Clutch and Machinery Company which bore the designation "M." He was told by each of these men that there were no such invoices. Thereafter, the bookkeeper of the company, in response to a subpoena, appeared before the Inteligence Unit of the Treasury Department at Toledo and gave testimony in which he stated that there were numerous sales on which "M" invoices were issued, and that there were possibly several reasons for issuing them; one being to conceal the fact that the company had sold certain materials in violation of the Controlled Materials Plan, provided for by federal statute to conserve materials for government use during the war period. In order to secure such materials for private use, individuals were obliged to procure a priority number from the government. The evidence in the case discloses that appellant Hanson,

sometime in 1945, commenced to sell metal products to certain of his customers who had no priority number. The company issued so-called "M" invoices in such sales, which eventually amounted to large sums of money. If these sales showed on the company's books, it would be obvious to anyone inspecting them that the company or its officials were guilty of violation of the Controlled Materials law. In order to avoid violation of the income tax laws on the part of the corporation, it was decided not to enter these sales, as sales, but to record them as items in inventory, not at cost, but at sales price, inasmuch as it is admitted that by placing them in the inventory at sales price rather than at cost price, the profits on the sales would be reflected upon the books of the company so that, at the end of the year when the income tax return was made up for the company, the tax on such profits would be paid even though the transactions had not been entered as sales; and all of the income taxes of the company were duly paid. The checks which were received on these sales, on "M" invoices, were endorsed for deposit only and Mr. Hanson cashed them through some banking arrangement. If, in addition to placing the items so sold in the inventory at sales price, Hanson had turned the money over to the company, the corporate income would have been overstated, and a double tax on such profits would have resulted. He kept the cash in his possession. He testified that he had not only discussed the transaction with his bookkeeper but with the board of directors, consisting of his sister, his mother, and his brothers-in-law, Mr. John Reed and Mr. Sherman White. Mr. Reed testified that Mr. Hanson told them that the money was to be held until it could be properly entered on the books of the company, after the danger of prosecution for violation of the priority regulations had passed. However, before the period of limitations had elapsed for prosecution of the priority violations, the income tax

investigation had begun, and appellant's lawyer, Mr. Raymond, told him he should not at that time return the funds to the company as it might indicate some "sense of guilt" or evidence of income tax evasion.

Mr. Hanson claimed to be holding this money for the company. The government claimed it was his personal income which he had not reported. The crucial point in the case arose when the court refused to permit evidence to be introduced that all the items on the "M" invoices had been posted on the books of the company in inventory as sales prices. We are of the opinion that this was reversible error as it deprived appellant of the one explanation he had why the money claimed by the government to be his unreported income was not his money, but belonged to the company, and that he was, in a sense, only a trustee, or holder of the funds for the benefit of the company. All of the sales on the "M" invoices in question involved priority violations which appellant sought to conceal. Carrying such sales on the books of the company on closing inventory at sales prices reflected the profits on the "M" sales, actually made, on the company books. Appellant was entitled to have such evidence submitted to the jury on the issue whether the money represented by such items, entered in the books as inventory at sales prices, was money belonging to the company which he was holding for it, or whether it was his own personal income.

Appellant requested the trial court to charge the jury that where circumstantial evidence is relied on, the evidence must be such as to exclude every other reasonable hypothesis except the hypothesis of guilt. Stated in slightly changed form, "where guilt depends entirely upon circumstantial evidence, . . . the burden rests upon the government to prove its case not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis of innocence." *Epstein* v. *United States*,

174 F. (2d) 754, 769 (C. A. 6). The trial court instructed the jury on proof of guilt beyond a reasonable doubt, but not as to proof by circumstantial evidence to the exclusion of every reasonable hypothesis of innocence. As a result, the appellant's rights were not sufficiently stated by the general charge. See *Hendrey* v. *United States*, 233 F. 5, 19 (C. C. A. 6).

The judgment is reversed and the case is remanded to the District Court for a new trial.

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No. 245

In the Supreme Court of the United States

OCTOBER TERM, 1958

C. O. HANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINION BELOW

The opinion of the Court of Apeals (Pet. 1a-5a) is reported at 254 F. 2d 359.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1958 (Pet. 1a), and a petition for rehearing was denied on June 2, 1958. On June 26, 1958, the time for filing a petition for certiorari was extended by order of Mr. Justice Burton to August 1, 1958. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the indictment alleging petitioner's wilful attempted evasion of the taxes of his corporation for the year 1945 should have been dismissed for vagueness because it referred to the filing of a false and fraudulent tax return, whereas the bill of particulars and the proof disclosed that two returns had been filed, an income tax return and an excess profits tax return.

3. Whether the trial court committed any reversible error in the admission and exclusion of evidence.

4. Whether the trial court unduly limited the petitioner's cross-examination of a Treasury agent by not making available to petitioner that portion of a page of the agent's diary which related to a tax case other than petitioner's.

5. Whether the trial court erred in not affording petitioner an opportunity to interrogate the jurors as to what evidence they had considered in reaching their verdict of guilty.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On March 10, 1952, petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of wilful attempted evasion of his individual income taxes (for 1945 and 1946) and on one count of wilful attempted evasion of the 1945 taxes of the Hanson Clutch and Machinery Company, of which he was president and principal stockholder, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 11a-14a):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1945 (corporation)	$65,255 69	$43,660 95	$104,569 04	$75,781 12
1945 (individual)	18,520 42	6,500 82	63,871 83	38,306 18
1946 (individual)	20,954 29	6,873 99	60,881 28	32,519 41

After a jury trial, petitioner was found guilty on all counts. On April 12, 1957, petitioner was sentenced to concurrent prison sentences of eighteen months on each count and fined $10,000 on each count. (R. 114a-115a.)

The evidence to support the verdict may be summarized as follows:

During the prosecution years, petitioner owned 90% of the stock of the Hanson Clutch and Machinery Co.,

of which he was the operating head. The board of directors was comprised entirely of petitioner and his relatives. (R. 348a-349a.) The Treasury agents discovered, at the outset of their investigation, that there were numerous deposits to petitioner's personal bank account which could not be accounted for by the corporation's record of payments to him. (R. 334a.) The investigation later disclosed the omission of many large sales from the records of the corporation, and the diversion of the receipts of such sales by petitioner to his own use. Regular sales were generally made on an "E" series of invoices. Most of the omitted sales were made on a special series of invoices labeled "M". The use of such invoices first came to the attention of the agents when they found that one Kranz was using some Hanson equipment which had been billed on an invoice numbered M-93. The company's recorded invoices did not disclose this invoice or any other "M" invoices. Petitioner denied to the agents that there was any such series of invoices in existence. (R. 334a-338a, 642a.) However, a few days after the agents revealed their knowledge of invoice M-93, petitioner gave them a list purporting to include all of the sales billed on "M" invoices. (Govt. Ex. 14, R. 415a, 470a-471a.) This list disclosed the sale of only two large pieces of equipment, the balance being shown as small billings for such things as repairs and repair parts. The two large pieces of equipment were those sold to Kranz and the Dulaney Company, and the agents had already asked petitioner about the Kranz sale and the deposit of funds involving the Dulaney sale. (Govt. Ex. 14; R. 339a-340a.)

Not satisfied with the list furnished them by petitioner, the agents continued their investigation by trac-

ing the serial numbers of cranes missing from the company's sales records. It was found that a number of them had been sold through a third-party sales agent. Examination of the records of the sales agent disclosed the sale by petitioner's company of nine cranes and one trailer, all of which were billed on "M" invoices and none of which were recorded as sales on the company's books. (Govt. Ex. 16; R. 340a-343a.) As the investigation progressed, other large suppressed sales were unearthed, and the falsity of the list submitted to the agents by petitioner became more apparent. That list (Govt. Ex. 14) set forth 190 sales, showing the ostensible purchasers and amounts, generally only a few dollars for each sale. All of the omitted sales of cranes later discovered by the agents to have been sold on "M" invoices had numbers corresponding with those on the list. For example, the list furnished by petitioner showed a sale to an individual for $10.35 on invoice M-158; investigation disclosed that actually invoice M-158 was issued for the sale of a crane to a company for $5,228.00. (Govt. Ex. 14, R. 343a, 675a-678a.)

The proceeds of sales billed on "M" invoices were received by petitioner personally. The purchasers issued checks or bank drafts payable to the Hanson Company, but by special arrangement with his bank petitioner was permitted to cash them, even though they were usually endorsed "for deposit only" to the company account. All of the funds thus received by petitioner were either taken out of the bank by him in cash, deposited into his personal account, applied to his personal loan account at the bank, or placed by petitioner in his safe deposit box. (R. 151a-242a, 255a, 267a-323a, 344a, 356a-362a 648a-652a, 688a-689a.)

The Government's proof established that petitioner's true net income for 1945 was $92,178.33, compared

with the $18,520.42 reported on the return, an understatement of $73,657.91; and that his true net income for 1946 was $65,974.36, compared with $20,954.29 reported on the return, an understatement of $45,020.07. (Govt. Exs. 95, 95e, 96, 96d; R. 372a, 375a, 389a, 475-479a.)

Some of the cranes sold by the Hanson Company, though not reflected in the sales or cash receipts records, were included in the closing inventory at selling price. This manipulation, in effect, caused the profit on the sale of those particular items to be reported for *corporation* tax purposes. (R. 373a-374a, 457a-460a.) In 1945, however, there were seven large pieces of equipment sold which were reflected neither in the sales account nor in inventory. These seven items were responsible for the great bulk of the understatement of 1945 corporate income, amounting to $47,192.13. (Govt. Ex. 95, 95d; R. 372a-377a, 473a-474a, 646a-647a.)

Petitioner took the stand in his own defense, and testified that he had had no intention of violating the federal revenue laws but only the war-time priorities regulations promulgated by the War Production Board; that he had instructed certain employees to keep the "M" invoices and the checks received in payment thereof separate from the other records; and that in 1954, two years after the indictment was returned, he had made restitution to the company for the proceeds of the checks he had received in 1945 and 1946. (R. 611a-616a, 619a-623a.)

ARGUMENT

1. There is plainly no merit to the contention (Pet. 6-8, 11-19, 21-22, 29-30) that the evidence was insufficient to sustain the verdict. The Government proved that during the two prosecution years petitioner had

systematically diverted some $118,000 of corporate income to his own use and had reported none of it on his individual income tax returns; that these items had been billed on a separate series of invoices which were not reflected in the corporation sales or cash receipts; that the existence of this series of invoices was first denied by petitioner; that, when further questioned by the Treasury agents about two specific sales, petitioner produced a false list purporting to account for all such sales; that this list omitted virtually all of the large sales except the two that the agents had inquired about; and that, while most of the $118,000 was reported as *corporate* income by manipulation of the closing inventory figures, some $47,000 was not. (*Supra*, pp. 3-6.) As a result of these actions, petitioner's tax returns understated his true tax liability by some $85,000, and the Hanson Company's tax liability was understated by some $37,000. (Govt. Exs. 95d, 95e, 96d; R. 473a-474a, 476a, 479a.) Moreover, the Government proved the falsity of petitioner's testimony that he had been attempting to evade the material priorities regulations of the War Production Board rather than the internal revenue laws. It was shown that purchasers of the machinery in question needed no priorities after September 30, 1945; that all but two of the suppressed sales were made after that date; and that one of those two purchasers did, in fact, have a priority. (Govt. Exs. 95, 96, 119, 122, p. 12487; Deft. Ex. W; R. 675a, 698a-700a, 711a.)[1]

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[1] Petitioner's version of the facts (Pet. 11-19) is based mainly on his own testimony, which the jury must be assumed to have rejected. In view of the Government's evidence of current corporate earnings or profits available for dividend purposes (Govt. Exs. 95d, 95e; R. 475a-479a), petitioner, seeking to distinguish *Cuzzo v. United States*, 166 F. 2d 346 (C.A. 1st) and *Davis v. United States*,

2. The contention (Pet. 7, 11) that the indictment alleging petitioner's attempted evasion of the corporation's 1945 taxes should have been dismissed for vagueness is equally without merit. The indictment (R. 11a-12a) alleged that the means of evasion was the filing of a false and fraudulent tax return. The corporation had, in fact, filed two returns for that year, an income and declared value excess profits tax return, and an excess profits tax return. (Govt. Exs. 90, 90a.) However, petitioner could not have been misled. The charging part of the indictment refers to "the taxes" due and owing by the corporation (as contrasted with the phrase "income tax" used in the indictment alleging evasion of petitioner's individual tax liability), thus embracing all of the federal corporate taxes due for that year—income tax, declared value excess profits tax, and excess profits tax. Moreover, the reported income figure stated in the indictment appears on *both* returns, and the reported tax figure there stated is the *total* of the taxes reported on the two returns. The Court of Appeals was plainly right in holding that the indictment was "sufficient to enable appellant to prepare his defense and protect him against a second prosecution for the same offense". (Pet. 5a.) Any conceivable confusion was obviated by the Government's bill of particulars, which clearly informed petitioner that all three kinds of taxes were involved. (R. 19a-20a.)

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226 F. 2d 331 (C.A. 6th), certiorari denied, 350 U.S. 965, contends (Pet. 6-7; 29-30) that the Government erred in treating as a constructive dividend corporate income diverted by petitioner to his own use, because there can be no constructive dividend without a depletion of the corporate assets. The fallacy is patent. The corporate assets *were* depleted. The inclusion in the corporation's closing inventory of some of the machinery sold on "M" invoices was false. The machinery was gone and petitioner had pocketed the proceeds. (*Supra*, pp. 4-5.)

Finally, it should be noted that the prison sentence imposed with respect to this count runs concurrently with those imposed on the other two counts. (*Supra*, p. 3.)

3. Petitioner raises three points concerning the admission and exclusion of evidence, none of which has substance.

(a) Petitioner argues (Pet. 7, 22-23) that the trial court erred in permitting enlargements of the Government's summaries of alleged unreported income and tax deficiencies to be placed before the jury during the examination of the two Treasury agents who had prepared them and during the cross-examination and redirect examination of petitioner (R. 353a, 491a, 634a). The originals of these enlargements were admitted in evidence for the limited purpose of illustration, and not as evidence of the facts. (Govt. Exs. 95, 95a, 95d, 95e, 96, 96a, 96d; R. 352a-353a, 366a, 368a, 378a, 383a, 384a, 386a.) As each enlargement was produced, the trial court cautioned the jury repeatedly that these summary charts were being used for purposes of illustration only, i.e., to clarify the testimony of the agent; that they were not to be considered as evidence; and that if they contained anything which did not conform to the evidence they were to be disregarded. (R. 366a, 368a, 378a, 383a, 384a, 386a.) Use of the charts was permitted during the cross-examination of petitioner, in order that his attention might be called to particular items, and defense counsel himself found them useful during petitioner's redirect examination. (R. 634a, 690a.) Later, at the request of defense counsel, the charts were turned away from the jury's view. (R. 734a.) In his final charge to the jury, the trial judge gave careful, detailed "guarding instructions" about

the use to which the schedules were to be put (R. 68a.). See *Holland v. United States*, 348 U. S. 121, 127-128.

(b) Petitioner contends (Pet. 7-8, 19-20, 30) that the trial court erred in excluding from evidence Defendant's Exhibit SS for Identification, which consisted of a contract between petitioner and his corporation, dated April 30, 1954, under which he agreed to make restitution for the amount of corporate funds diverted by him, and an attached summary showing the computation of the amount ($99,985.05) (R. 128a-138a, 619a, 696a). The document was properly excluded because (1) it contained many self-serving statements as to which no evidence had been introduced; (2) having been prepared in 1954, two years after the indictment was returned, it could hardly shed light on petitioner's intent in 1945 and 1946; and (3) in view of petitioner's ownership of over 90% of the corporation's stock, the contract was little more than an agreement which he had made with himself. (R. 112a-113a, 128a, 140a, 619a.) Moreover, the exclusion of this exhibit could not have prejudiced petitioner because he was permitted to testify to the drawing of the agreement and to his return of the funds to the corporation pursuant to the agreement. (R. 619a.)

(c) Petitioner urges (Pet. 3-5, 25, 31) that the trial court erred in permitting the Government to show, on rebuttal, that the company had made two large suppressed sales not listed in the bills of particulars and not referred to in the previous testimony (Govt. Exs. 117, 117a, 118; R. 712a-717a, 722a-723a, 738a-739a). The evidence was received on the issue of petitioner's intent, and the proceeds of these sales were not included in the Government's summaries of unreported income. (R. 716a-717a.) The trial court was clearly correct. Petitioner told the jury that he had received the pro-

ceeds from all the sales on "M" invoices, that he had restored all of the diverted funds to the company, and that he had now accounted for all such sales. (R. 611a-623a, 648a-649a.) The Government's proof of the two newly discovered (R. 712a-713a, 722a-723a) sales tended to rebut this testimony.[2]

4. The argument (Pet. 3, 23-24, 28-29) that the conviction should be reversed because defense counsel was not afforded an opportunity to inspect a page of a diary kept by one of the Treasury agents has no merit. Petitioner's purpose was to impeach the agent's testimony that the investigation of petitioner was under way as early as October 25, 1948, when he first interviewed petitioner. (R. 402a-403a.) Actually, the diary extract supported that testimony, because it disclosed that the agent warned petitioner of his constitutional rights at that very interview. (R. 412a-413a.) Petitioner makes no attempt to show that he may have been prejudiced by the incident, or indeed that it was of any importance at all. Moreover, he got all he was entitled to. The pertinent diary extract was copied and turned over to him. (R. 403a-404a, 406a.) The only portion of that page withheld related to another case which the agent happened to be investigating at the same time. (R. 401a-404a, 405a-407a.)

5. The contention (Pet. 5-6, 26-27) that petitioner should have been granted a hearing for the purpose of interrogating the jurors as to the basis for their verdict

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[2] Petitioner's complaint (Pet. 25, 31) that the Government failed to prove that these two machines were paid for goes to the weight of the evidence rather than its admissibility. If, in fact, they were not paid for (a highly unlikely possibility) petitioner was free so to testify. He did state on surrebuttal that he had no knowledge of receiving the proceeds of these sales (R. 738a), but the defense requested no continuance in order to check the matter.

and the nature of their deliberations is frivolous. *Hyde v. United States*, 225 U. S. 347, 383-384; *Mattox v. United States*, 146 U. S. 140, 149; *Brown v. United States*, 224 F. 2d 845 (C.A. 6th), certiorari denied, 350 U. S. 912; *Furlong v. United States*, 194 F. 2d 1, 4 (C. A. 7th), certiorari denied, 343 U. S. 950. Cf. *Rakes v. United States*, 169 F. 2d 739, 745 (C. A. 4th), certiorari denied, 335 U. S. 826.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1958.

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C. O. HANSON, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY

To United States Brief in Opposition to Petition For Writ of Certiorari

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PETITIONER'S REPLY

To United States Brief in Opposition to Petition For Writ of Certiorari

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The Brief of the Respondent filed in opposition to the Petitioner's Petition for a Writ of Certiorari is a remarkable document in one—the main—respect. Nowhere does it endeavor to support the indictments, that is, the filing of false and fraudulent individual returns for the years 1945 and 1946 and the corporate return or returns for the year 1945. It confines itself—as indeed it must—to facts that charge only false bookkeeping; and, studiously avoids an endeavor to establish the filing of false returns.

The crimes—if indeed any were committed—is the filing of false and fraudulent tax returns with intent to evade tax. The crime is such filing, whenever it takes place, and not the state of the books when entries are made or omitted. Book income is not necessarily taxable income, and the proof must be linked to a false tax return. That has not been done here. For example, the Government in its brief in opposition in the course of summarizing its proof after stating that the Petitioner had systematically diverted some $118,000. of corporate income to his own use, goes on to state (p. 7):

> "and that, while most of the $118,000. was reported as *corporate* income by manipulation of the closing inventory figures, some $47,000. was not."

Now, assuming arguendo, that $47,000. was not, but should have been, reported as income, although such is not a fact (see compilation on pages 18 and 19 of Petition) and was omitted due to "manipulation of the closing inventory figures", what evidence was adduced to establish beyond a reasonable doubt that such $47,000. did represent fraud and not error. The taxpayer met the issue—beginning with $46,851.62, the actual figure, (p. 18 of Petition) instead of the round figure of $47,000. What do we find? We find that the Government by Gov. Exhibit No. 71 establishes the fact, confirmed by the Petitioner, that the two Erie machines were his personal property and did not belong on the books or inventory; that another machine was in transit over the year-end and three had been sold on the installment basis; and that the petitioner in his own handwriting (Gov. Exh. 12f) (R. 121a) directed the inclusion of "M" invoices in inventory.

That is typical of the state of the record whereunder we contend the case should not have gone to the Jury. The Government's claim of $47,000. omitted from income and $118,000. diverted from income is specious and a far cry from proof beyond a reasonable doubt.

Where the Government admits, as it does in the above quotation, that all but $47,000. of the $118,000. was tax paid, and by its own Exhibits eliminates or casts doubts on the remaining $47,000., what grounds are there for submitting the case to the jury? It is safe to say that had the Government admitted to the Court and to the jury what it admits in the above quotation, that is, that "most" of the $118,000 was reported as corporate income, the trial Court would not have let the case go to the jury, and if it had, the jury would not have convicted.

Confining ourselves to meeting, in order, the statements made by the Government under the headings of "Statement" (p. 3) and "Argument" (p. 6) we submit:

The Government contends that the verdict is supported by the following evidence (Gov. Br. 3): the Kranz deal set forth on page 4 of the Government's brief; petitioner's denial of "M" invoices to the agents; failure of the recorded invoices to record the Kranz installment deal; and the list (Gov. Exh. 14) given to the agent supposedly by the petitioner. In view of the Inventory admission (p. 7) heretofore mentioned, we submit that these items are not proof of the filing of a fraudulent tax return—if they prove anything, it is proof of an attempt to *conceal* a fraudulent tax return; but *not the making* of a fraudulent tax return. They are two different crimes.

*The "falsity of the list * * * became more apparent."* (Gov. Exh. 14) (p. 5): So what! The crime charged is the filing of a false return with intent to evade tax—not the concealing of such crime.

"The proceeds of sales billed on "M" invoices were received by petitioner personally" (p. 5) and a long dissertation on the procedures involved, but omitting all reference to the fact that "most" (p. 7) of such items were inventoried. It asserts that the petitioner took the money out of the bank in cash, deposited it in his personal account, applied it to his personal loan; or placed it in his safe deposit box. So what! In view of the inventorying of most of the items, how does this prove the making of a false tax return?

The Government compares the income reported with the figure it alleges to be correct at the foot of page 5 and the top of page 6. Assuming the Government figures to be correct, what does that prove? A mere difference in amount is not conclusive of fraud—there must be more.

Next on page 6, the Government after admitting that the profit on cranes included in inventory (at sales price) resulted in no understatement of income, *declares that seven items were not so included; and constituted "the great bulk of the understatement of 1945 corporate income".* The understatement, with nothing more, is not proof of fraud; and it is fair to assume that if there were more, the Government would have directed attention to such evidence.

In the closing paragraphs of the "Statement" (p. 6) the Government states the petitioner took the stand; that he testified he had no intention of violating the revenue laws; that he instructed employees to keep

the "M" invoices and proceeds separate; and that he made restitution in 1954. We submit that not one of the facts set forth in this paragraph is proof of a fraudulent tax return; that it omits the inventory treatment of such sales; and that the Government evidence (Gov. Exh. 12-f) (R. 121a) sustains the petitioner's evidence of his instructions to inventory all such items as are now alleged to be the gravamen of a fraud.

We submit that the Government's "Statement" of the facts supports the petitioner's contention that there was no evidence to warrant submitting the case to the jury.

Addressing ourselves, now, to the Argument made by the Government, we direct the Court's attention to the following:

Re: Point No. 1 (p. 6). The Government contends that our position that the evidence was insufficient to sustain the verdict is without merit (p. 6) and in support of its position recites (p. 7) the following: that the petitioner diverted $118,000. of corporate income, although "most" was reported as corporate income; in which case, the fraud, if there was one, took place in the years the items were removed from inventory rather than in the years charged— if they were ever fraudulently removed; also that no priorities regulations were needed after September 30, 1945. The Government's expert witness on direct examination so testified; nevertheless, on cross-examination the witness acknowledged that ratings were in effect through April 1946 (R. 706a-707a); that only a new application for a rating was needed (R. 708a); and thus were still in effect in 1947 (R. 710a).

We submit that the Government has not "proved the falsity of petitioner's testimony" respecting priority regulations.

The Government in a footnote (p. 7 and 8) presumes to meet our argument on the absence of a depletion of the corporate pocketbook here as contrasted with such depletion in the cases of *Currier* v. *United States*, 166 F. 2d 346 (C.A. 1st) and *Davis* v. *United States*, 226 F. 2d 331 (C.A. 6th), certiorari denied, 300 U.S. 965, in order to preserve its treatment of a constructive dividend; and claims the "fallacy is patent", and the corporate assets "*were* depleted"; that the inclusion in closing inventory was false; that the machinery was gone and petitioner had pocketed the proceeds.

Let's test that statement, bearing in mind the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt. The items omitted from the closing inventory were the two Erie shovels respecting which the Government adduced Gov. Exh. 71 showing ownership in the petitioner—not the corporation; one shovel in transit (Dulaney); and three shovels sold on the installment basis (Kranz, H. London and M. London). Clearly there is grounds for the inclusion of such machines—excepting the two Erie machines that admittedly belonged to the petitioner personally—in inventory. The Government offered no evidence to show that title had passed to the purchaser on the machine in transit to Texas, and under normal business practice title would not have passed while the machine was in transit; there was no evidence that the three installment sales were not covered by a chattel mortgage or other fi-

nancial arrangement retaining title in the corporation until paid for.

We submit on Government's point 1 of the argument the Government has presented nothing to warrant the case going to the jury, or to sustain the jury's verdict.

Re: Point No. 2 (p. 8). Here the Government argues that the indictments were sound and valid. A reading of the Government argument confirms our contention that they were not. The Government contends that even though the reference to the tax returns as the "return" in the indictment is in the singular rather than the plural, the indictment by failing to characterize the term "tax" was "embracing all of the federal corporate taxes due for that year—income tax, declared value excess profits tax, and excess profits tax." Did it include all taxes? What about capital stock tax return and tax, social security returns and taxes; and, withholding tax returns and taxes? The Government's effort to extricate itself from the vagueness of the indictment only makes the vagueness more patent. The bill of particulars cannot expand the indictment—it cannot supply what is not there—it can only limit the proof within the scope of the indictment.

The conviction should be set aside because the concurrent running of the prison sentence does not cure the defect in the indictment or eliminate the separate fine.

Re: Point No. 3. In the third section of the argument the Government divides its argument into three parts, namely, (a) (b) and (c). We shall discuss each.

(a) The Government states what it considers to be the facts respecting *the enlargements*—not in evidence—of exhibits in evidence for limited purposes; but does not cite any authorities to support their use. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 128:

> "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

and where, as here, they are allowed to remain in full view beyond the time the witness introducing them is on the stand, the jury is likely to give them an importance beyond the limits imposed by the Court. How can one conclude they did not influence the jury adversely?

The writ should be granted because of such prejudice.

(b) The Government attempts to support *the Court's refusal to admit in evidence Defendant's Exhibit SS for Identification* (R. 128a-138a) on three grounds; that it contained self-serving statements, that it was prepared in 1954, and that it was an agreement by the petitioner as an individual and the petitioner as 90% owner of the corporation.

The facts are, as stated in the exhibit, two attorneys negotiated the agreement based on an accountant's findings and the petitioner executed and carried out the agreement. The agreement goes to the very gravamen of the case—did or did not the petitioner hold such monies for the corporation? What the Appellate Court said respecting "M" invoices in its deci-

sion reversing the first trial (Petition App. p. 9) applies with equal force here:

> "Appellant was entitled to have such evidence submitted to the jury on the issue whether the money represented by such items, entered in the books as inventory at sales prices, was money belonging to the company which he was holding for it, or whether it was his own personal income."

We submit that the failure to accept such exhibit in evidence was reversible error.

(c) This point relates to *the rebuttal testimony* involving the Ritter Lumber Company purported sales. The Government's attempt to justify this evidence is whimsical. It states the evidence tended to rebut the petitioner's testimony that he received the proceeds of all "M" invoice sales, that he restored the funds, and now accounted for all such sales; and in a footnote belabors the defense for failing to ask for a continuance "in order to check the matter." Are we to believe that the Government intended to show by this testimony that the petitioner *did not* receive the proceeds of such sale? That he testified incorrectly when he told the jury "that he had received the proceeds from all the sales on "M" invoices"? Are we to believe that such testimony rebutted the petitioner's testimony that he restored the funds, when the Court excluded the detailed accounting of such sales—Pet. Exh. SS for Identification? Are we to believe that the defense was required to prove the petitioner did not receive the proceeds of sale of items not at issue as a crime and to ask for a continuance to prove such fact? Who had the burden of proof?

We believe the foregoing queries demonstrate the whimsical nature of the Government's argument and that the petitioner is entitled to a writ of certiorari and a reversal of the conviction.

Re: Point No. 4. Here the Government, in discussing the point we make claiming the *right of the defense to inspect certain documents*, instead of the Court doing so "in camera" on which point this Court ruled in *Jencks* v. *United States*, 353 U.S. 657 omits all reference to the *Jencks* case and contends the point has no merit. We submit *Jencks* v. *United States* (supra) is the law and cannot be cast off with the bare statement that an issue based thereon "has no merit". The sufficiency of the information furnished the defense is not the issue, the issue is as stated by this Court at page 672:

> "The burden is the Government's, not to be shifted to the trial judge, to decide * * * upon the possible disclosure of state secrets and other confidential information in the Government's possession."

The decision in the case at bar was rendered by the trial court before the Supreme Court spoke in *Jencks* v. *United States* (supra). The law was not changed until Congress acted on Public Law 85-265, 85th Congress, S. 2377, September 2, 1957, (71 Stat. 595) where it tempered the *Jencks* decision for future application. Nevertheless, at the trial in the case at bar, the law as pronounced by this Court in *Jencks* v. *United States* (supra) was the law; and a question based thereon does have merit.

We firmly believe certiorari should issue on this question.

Re: Point No. 5 Here the Government responds to our question respecting the conduct of the jury, juror No. 2, Mr. Strawn, and the Court's failure to grant our motion for interrogation of the jury. The Government does no more than classify the point as frivolous. Notwithstanding the characterization applied by the Government, it cites *Mattox* v. *United States*, 146 U.S. 140; which case, in fact, supports our position. There, this Court held that a matter resting in the personal consciousness of a single juror should not be received in derogation of the verdict; nevertheless, there was an exception in the interest of justice; and, quoting from Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kansas 539, 545 said:

> "as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard."

We submit it was error for the trial court to fail to recall the jury for interrogation.

Conclusion: In concluding our Reply we direct attention to two questions raised by the Petition that the Government completely ignores in its brief.

Petitioner's question No. 7 which goes to the treatment of *a constructive dividend and its premise as a fraud charge* is mentioned by the Government only in a footnote on pages 7 and 8 of its brief; and there it confines itself to a discussion of the facts. It does not treat of the law at all, and we believe this Court should do so and set at rest that point.

Petitioner's question No. 12 relating to the binding effect of an offer of evidence. Throughout the trial the Government adduced evidence, oral and as exhibits that establish the lack of intent to defraud such as Gov. Exh. 71 (R. 123a) showing the ownership of the two Erie cranes to be in the petitioner's possession and not the corporation; and Gov. Exh. 12(f) (R. 121a) bearing the legend in the petitioner's handwriting "List in Inventory". Is not such evidence binding on the Government and does it not disprove an intent to defraud?

The Government, in its brief, has not come forth with any reason why the writ should not issue—it would have better acquiesced in petitioner's petition for a writ.

For the reasons stated herein and in the petition, the writ should issue.

Respectfully submitted,

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